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No. 80-1004

In the Supreme Court of the United States

OCTOBER TERM, 1980

J. LEE HAVENS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER PRESENTING SUPPLEMENTAL AUTHORITY

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TABLE OF AUTHORITIES

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Cases:

United States v. Conway, 632 F. 2d 641 . . . . . 1, 2, 3
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SUPPLEMENTAL AUTHORITY

Pursuant to Rule 22.6 of this Court, Petitioner, J. Lee Havens, herewith directs this Court's attention to *United States vs. Conway,* 632 F. 2d 641 (1980), decided by the Court of Appeals for the Fifth Circuit on December 11, 1980, and thus, not available at the time of Petitioner's application, herein, for a Writ of Certiorari, which application is now pending.

ARGUMENT

In *United States vs. Conway, supra,* a criminal defendant, convicted of conspiracy to import cocaine in violation of 21 U.S.C. 963, alleged that he was denied the effective assistance of counsel, in violation of the Sixth Amendment. Specifically, the defendant cited the trial court's order to him not to discuss the case with his attorney during a lunch break, which lunch break interrupted his cross-examination. Citing *Gedders vs. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), the Fifth Circuit agreed, reversed the conviction, and held as follows:

> "Accordingly, we hold that depriving a criminal defendant of the right to consult with counsel during court recesses -- regardless of how brief the recesses may be -- violates the constitutional right to effective assistance of counsel." 632 F. 2d at 645.

In essence, *Conway* stands for the proposition that the Sixth Amendment right to the effective assistance of counsel arises during any formal interruption (no matter how brief) in a criminal defendant's cross-examination. When such an

interruption occurs, the Sixth Amendment bars a trial court -- even under the rubric of prevention of witness "coaching" -- from erecting any barrier to the constitutional right of a criminal defendant and his lawyer to freely consult. Thus, in *Conway,* the trial court's prohibition of attorney-client consultation during a luncheon interruption in the defendant's cross-examination was held to be reversible error.

As compared to the case at bar, the *Conway* case presents virtually identical facts. Both are decisions of the Court of Appeals for the Fifth Circuit, albeit by different panels.[1] Both involve convictions under 21 U.S.C. 963. Both involve trial court prohibition of attorney-defendant consultation during a formal interruption of the defendant's cross-examination, allegedly to prevent witness "coaching".

True, in *Conway* that prohibition was directed to the criminal defendant; whereas, in the case at bar, that prohibition had defense counsel as its target. This is, however, a difference of surface, not of substance. The Sixth Amendment must protect both defendant and defense counsel, if it be not an illusory promise.

True, in *Conway* that interruption was a break for lunch; whereas, in the case at bar, that interruption was a colloquy -- in the jury's absence and with the defendant, petitioner herein, excused from the witness stand and banished from the court

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[1] Under Rule 17.1(a) of this Court, conflicting opinions, on the same matter, by Courts of Appeals are a consideration in granting writs of certiorari. Such conflict exists, here within a Circuit, between the *Conway* decision and the case at bar.

room -- between the prosecutor, the judge, the defense counsel and a prosecution witness. This is, however, again a difference of surface, not of substance. The Sixth Amendment guarantee to the effective assistance of counsel must attach to any formal interruption -- no matter how brief, no matter how labelled -- in a criminal defendant's cross-examination, if it be not an illusory promise. All that is required, under the Sixth Amendment, is a formal interruption. That requirement is met in *Conway* by a lunch "recess". Likewise, that requirement is met in the case at bar when the trial court excused the jury, and excused the defendant (petitioner herein) from the witness stand and banished him from the court room. This sequence of events, which the government is now pleased to call "a bench conference" (Ans. 5), was, in fact, tantamount to a recess, whatever it be labelled. It was, assuredly, a formal interruption in petitioner's cross-examination.

Accordingly, a formal interruption of the petitioner's cross-examination having occurred in the case at bar, as above noted, the trial court's interdiction of any consultation between petitioner and his defense counsel, before the petitioner resumed the stand and before the jury was recalled, is an impermissible violation of petitioner's right, under the Sixth Amendment, to freely consult with counsel.

CONCLUSION

It is, again, respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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